1992

Robert E. McClellan v. Mountain America Credit Union : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

No. 920217-CA

ROBERT E. MCCLELLAN

Defendant-Appellant,

v.

MOUNTAIN AMERICA CREDIT UNION
as successor in interest to
HORIZON THRIFT

Plaintiff-Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL
DISTRICT COURT OF IRON COUNTY
THE HONORABLE J. PHILIP EVES
No. 89-164

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This appeal is taken from an order entered by the Fifth Judicial District Court of Iron County, State of Utah, on January 23, 1990; an Order of Dismissal denying McClellan's request to file a cross claim and third party claims entered December 27, 1991; and an Order denying McClellan's Motion to Reconsider and Set Aside Judgment Pursuant to Rule 54(b) entered on January 17, 1992. Jurisdiction is proper under Utah Code Annotated § 78-2-2 and Rule 3, Utah Rules of Appellate Procedure.

II. ISSUES PRESENTED

1. Did the District Court err in granting judgment on the pleadings finding McClellan personally liable on a promissory note when his answer clearly raised the defense that the note was signed only in his corporate capacity? STANDARD OF REVIEW: Question of law reviewed for correctness. Rule 12(c), Utah Rules of Civil Procedure; St. Benedict's Div. Co. v. St. Benedict's Hospital 811 P.2d 194 (Ut. 1991).

2. Did the District Court err in granting judgment on the pleadings when McClellan, in a specific affidavit, pointed to discoverable evidence he had not been given an opportunity to obtain that would establish his defense? STANDARD OF REVIEW: Question of law reviewed for correctness. Rule 12(c), Utah Rules of Civil Procedure; St. Benedict's Div. Co. v. St. Benedict's Hospital 811 P.2d 194 (Ut. 1991).

3. Did the District Court err in denying McClellan's request to set aside judgment when the undisputed evidence showed that Plaintiff had violated the one action rule by failing to preserve and foreclose a real estate mortgage securing the debt? STANDARD OF REVIEW: Question of law reviewed for correctness. Rule 54(b), Utah Rules of Civil Procedure; Barber v.

Farmer's Ins. Exchange 751 P.2d 248 (Utah Ct. Ap. 1988).

4. Did the District Court abuse its discretion in refusing to allow McClellan to amend his answer and assert a cross claim against a co-defendant who signed the same note in the same manner as McClellan when no trial date had been established, no discovery cutoff had been established and no motion cutoff had been established? STANDARD OF REVIEW: Abuse of discretion. Rule 13, Utah Rules of Civil Procedure; Girard v. Appleby 660 P.2d 245 (Ut. 1983).

III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Code Ann. §78-38-1 provides:

> There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter. [requiring exhaustion of remedies against security]

Utah Rule of Civ. Pro. 12(c) provides:

> After the Pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

Utah Rule of Civ. Pro. 13(f) provides:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein or relating to any property that is the subject-matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant.

Utah Rule of Civ. Pro. 15 provides:

> A party may amend his pleading once as a matter of course at any

time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Utah Rule of Civ. Pro. 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added)

Utah Rule of Civ. Pro. 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

IV. STATEMENT OF THE CASE

This appeal arises from the default of Callistoga Corporation ("Callistoga") on a loan made to Callistoga by Horizon Savings and Loan. [Record 2] Mountain America took over Horizon Savings and Loan after it went into receivership. [Record 2] The loan was made on June 5, 1984, and total payment on the loan was due on September 9, 1984. [Record 4] The loan was

secured by real property located in Cedar City, Utah. [Record 142] The loan was evidenced by a promissory note signed by officers of Callistoga: Randy Hoyt, President, and Robert E. McClellan, Secretary. [Record 4] Both Hoyt and McClellan signed the promissory note a second time as officers of the corporation. [Record 4] A factual inquiry by the court into the purpose of the second signature has never been conducted. [Trans. Dec. 3, 1991 p. 8]

Mountain America brought an action on July 20, 1989, against Hoyt and McClellan, as co-defendants, seeking recovery based on the theory that they were personal guarantor's of the loan.[1] [Record 2] McClellan answered the complaint on September 12, 1989, admitted signing the note, but asserted that his signing of the note "was in his capacity as the secretary of the Callistoga Court Club, Inc." [Record 9, 10] McClellan also pled as an affirmative defense that "Plaintiff's Complaint asserts a liability for a Promissory Note which is a corporate liability not a personal liability, and the Defendant Robert E. McClellan is being sued personally." [Record 9]

On November 6, 1989, Mountain America filed a Motion for Judgment on the Pleadings asserting that McClellan's answer "does not deny the debt alleged. . . nor does it state other legal defenses to Plaintiff's claim." [Record 15] Without a hearing, the district court entered an order in favor of Mountain America on January 23, 1990. [Record 41]

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[1] Hoyt filed a motion to dismiss on September 6, 1989. [Record 7]. Notwithstanding Hoyt's motion, Mountain America then sought, and the court granted, a default judgment against Hoyt. [Record 29] Hoyt then moved to set aside the default judgment, which the court granted. [Record 89] Although the court set aside the default judgment, Hoyt remained before the court and Mountain America was provided the opportunity to bring an action against him. [Record 89] That Hoyt was a party to the underlying action was made clear when the Utah Supreme Court dismissed an appeal filed by McClellan because Hoyt was still a defendant before the trial court. [Record 108] Neither Hoyt nor Mountain America took further action in the case until McClellan sought to bring a cross-claim against Hoyt based on the fact that if McClellan had any liability on the note, Hoyt had the exact same liability. [Record 111] Hoyt then moved to have Mountain America's claim against him dismissed and to have McClellan's cross claim denied. [Record 134] Mountain America did not oppose Hoyt's motion. The court dismissed Hoyt, without prejudice. [Record 176].

Mountain America garnished McClellan's bank account and initiated supplemental proceedings to collect on the Judgment in late August 1990. [Record 54-57] It was then that McClellan found out for the first time that the Judgment had been entered. [Record 60] Proper notice of judgment pursuant to rule 58A was not served. [Record 43, 56, 62, 83] He then filed for a protective order and brought a Motion to Set Aside the Judgment. As part of this motion, McClellan's counsel, James Shumate, filed an affidavit stating he had important evidence that controverted Mountain America's claim.[2] [Record 81] The evidence that Shumate presented regarded Hoyt's recollection of the signing of the promissory note. [Record 81-83] Shumate averred that Hoyt informed him that the "second set of signatures on the Promissory Note were placed there by himself and Mr. McClellan and that they were placed there at the direction of the officers of Horizon Thrift and were not to represent a personal liability on the note." [Record 83] With that information, McClellan moved the court to set aside the Judgment. [Record 74]

At the hearing on the motion held on October 2, 1990, Counsel for Mountain America stated for the first time that Mountain America based its Motion of November 1989 on an answer to a request for admission. [Trans. 10] There is nothing in the record to support counsel's assertion. Not in the motion, not in the memorandum in support of the motion, nor anywhere else since the motion was decided without oral argument. [Record 15-17] In fact, the Motion filed, contrary to the assertions made by Mountain America's counsel, was captioned as a motion for Judgment on the Pleadings, not a motion for Summary Judgment. [Record 15] The

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[2]. In the affidavit, Shumate stated that he was unaware prior to August 1990 that Hoyt was represented by counsel and had been served in this case. [Record 82] He also stated that Mountain America had failed to provide the co-defendants copies of pleadings that had been filed against the other defendant. [Record 82] Thus, both parties were unaware that the other was involved in the proceeding. [Trans. Oct. 2, 1990 Hearing p.15]

substance of the motion and the supporting memorandum was that there were no controverted facts on the pleadings and therefore judgment was proper.[3] Nor does the order of the court dated January 23, 1990, include a reference to the admission. [Record 41]

As noted above, prior to the hearing on October 2, 1990, McClellan's attorney filed an affidavit in which he asserted that Hoyt had informed him that Hoyt would testify that officers of Horizon First Thrift had informed him and McClellan that their signatures did not create personal liability. [Record 81] Shumate stated in open court that he had been unable to secure an affidavit of Hoyt at that time. [Trans. Hearing Oct. 2, 1990 p.8] The district court denied McClellan's motion to set aside the judgment. [Record 89] The trial court found that there was no admissible evidence to support McClellan's claim that there was no personal liability. [Trans. Hearing October 2, 1990 p.13] Although the trial court recognized that from the face of the note it could be argued that McClellan and Hoyt were not signing personally, the court apparently refused to accept the proffer of evidence made in Shumate's affidavit that Hoyt would testify that the bank officers informed them their signatures did not create personal liability. [Trans. Hearing October 2, 1990 p.13] Nor did the court allow additional time to procure an affidavit of Hoyt to support the assertion made in Shumate's affidavit.

McClellan filed a notice of appeal. [Record 103] The Utah Supreme Court dismissed the appeal because defendant Hoyt was still before the district court, and therefore

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[3]. The entire text of the Motion for Judgment is as follows:

> COMES NOW the Plaintiff and moves the court for judgment against Defendant Robert E. McClellan in the principal sum of $40192.63, together with interest, costs and attorney's fees as appropriate, pursuant to Rule 12(c), Utah Rules of Civil Procedure, on the grounds that the Answer does not deny the debt and no genuine issue as to a material fact remains to be tried.
>
> Plaintiff requests that the court rule on this Motion without oral argument pursuant to Rule 4-501, Rules of Practice.

there was no appealable final judgment. [Record 108]

In November 1991, McClellan's counsel was informed by Mountain America, for the first time, that the loan to Callistoga had been secured by real property. [Record 142] Because Hoyt was still before the trial court, and there had been no motion or discovery cut-off, McClellan filed a motion to reconsider the decision against him based on evidence provided to McClellan's new counsel that the loan was secured by real property. [Record 138] Specifically McClellan moved the court to reconsider the interlocutory judgment against McClellan because Mountain America had taken no steps to exhaust the real property collateral prior to seeking recovery on the promissory note in violation of Utah's one-action rule. [Record 138] Mountain America responded to the motion for reconsideration by stating without any evidence that a foreclosure by a first trust deed holder "foreclosed out the interest of [Mountain America] before the instant action was filed." [Record 159] In his reply, McClellan pointed out that Mountain America's statement was false because the trust deed that was foreclosed had a later recording date than Mountain America's lien and that in reality, Mountain America was the first lien holder. [Record 179-180] McClellan filed an affidavit and exhibits to support this argument. [Record 181] Without a hearing and without stating the basis for its decision, the district court denied McClellan's Motion to Reconsider. [Record 220] No decision was made on which lienholder had first priority.

Contemporaneous with the Motion to Set Aside, McClellan filed a cross-claim against Hoyt because any liability that McClellan might have had was shared by Hoyt because they had signed the exact document in the same manner. [Record 121] He also sought to bring third party complaints against Callistoga Corporation, Edward Burgess, Jerry Houtz and Charles Bess, all of whom where shareholders in Callistoga. [Record 114] After oral argument on the motion,

the district court denied McClellan's motion without prejudice stating that any claim against Hoyt could be brought in a separate proceeding. [Trans. Hearing on Dec. 3, 1991 p.14] McClellan appeals from the original January 23, 1990 interlocutory judgment, the order of dismissal entered December 27, 1991, and the denial of the motion to reconsider entered January 17, 1992.

V. SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law when it granted Mountain America's Motion for Judgment on the Pleadings. A decision for Judgment on the Pleadings is only appropriate where there is no disputed facts on the face of the pleadings. Where the pleadings present controverted issues of fact, Judgment on the Pleadings is inappropriate. Here, the pleadings show that there was a factual issue whether McClellan signed personally on the note.

If, in examining a motion for judgment on the pleadings, a court looks beyond the pleadings, the rule and the judicial decisions interpreting it are clear that the court must provide the parties with notice of its intention. The policy behind the rule allows the non-moving party the opportunity to prepare its case and to controvert the evidence that the court is relying on.

The trial court abused its discretion when it found that the affidavit submitted by McClellan's attorney did not controvert Mountain America's claim that McClellan had admitted that he signed personally on the note. Under Rule 56(f) an attorney's proffer of what will be uncovered during discovery is sufficient to preclude judgment until discovery can be completed.

The trial court abused its discretion when it denied McClellan's motion to reconsider based on newly revealed evidence from Mountain America that the loan was secured with real property and that it had failed to comply with the requirements of the one-action rule. The record before the trial court established that the loan made to Callistoga was secured with real property

in Iron County, Utah. Although Mountain America argues that it was a junior lienholder, the facts show that it failed to allege its junior lienholder status and prove that the foreclosure by the first lienholder had exhausted the real property collateral leaving nothing to foreclose. This is a requirement in Utah prior to bringing an action on a promissory note secured by real property.

In addition, the facts show that Mountain America was really in the first lien holder position. Although there was a deed of trust foreclosed that had an earlier execution date, that deed of trust was recorded after Mountain America had recorded its deed of trust. Thus, Mountain America had a priority position. When the other party foreclosed on the property, Mountain America failed to take action to protect its position as the first lienholder in the collateral. In Utah, before an action to satisfy a default on a loan that is secured by real property can be brought against a debtor, the party seeking to recover on the loan must exhaust the collateral. As part of that requirement, the lienholder has an obligation to protect its interest in the collateral. Mountain America failed to do so.

The trial court abused its discretion when it refused McClellan the opportunity to amend his answer to include a cross claim against Hoyt. Courts freely allow amendments, especially when there is no trial date set or motion or discovery cut-offs and the other party is not prejudiced. It would seem especially appropriate here where the amendment merely attempted to bring a cross-claim against a co-defendant that was aware of the underlying claim and was therefore not prejudiced in any respect. Allowing an amendment to join a party is especially appropriate when doing so will avoid injustice occasioned by the potential of inconsistent and contradictory decisions.

VI. ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS WHEN MCCLELLAN'S ANSWER CLEARLY CONTROVERTED FACTS MATERIAL TO MOUNTAIN AMERICA'S CLAIM.

Though the District Court's January 23, 1990 order suggests that it was issued in response to a motion for summary judgment, it in fact was entered in response to Mountain America's motion for judgment on the pleadings filed pursuant to Rule 12(c) and decided without oral argument. [Record 15.]

A motion for judgment on the pleadings brought by the Plaintiff to ferret out legally insufficient defenses is governed by the same standards as a motion to dismiss under Rule 12(b)(6) brought by the Defendant in response to a legally flawed complaint. Crooked Lake Dev., Inc. v. Emmet County 763 F.Supp 1398 (D.C. Mich. 1991) The Rule 12(b)(6) motion for failure to state a claim and the Rule 12(c) motion for judgment on the pleadings are different sides of the same coin.

In review of such a motion, the Court of Appeals is obliged to construe the allegations of the answer in the light most favorable to the Defendant and to indulge all reasonable inferences in its favor. See Heiner v. S.J. Groves & Sons Co. 790 P.2d 107 (Ut. Ct. App. 1990). The Defendant can win a Rule 12(b)(6) motion only if the Plaintiff could prove no set of facts in support of his claim. See Colman v. Utah State Land Bd. 795 P.2d 622 (Ut. 1990). Likewise, the Plaintiff can prevail on a motion for judgment on the pleadings only if no set of facts could be proved by Defendant that would constitute a valid defense. 5A Wright & Miller Federal Practice and Procedure § 1368 at 518-19 (1990).

When McClellan's answer is viewed in this light, the District Court's grant of the motion for judgment on the pleadings must be reversed.

In response to Mountain America's allegation that "Defendants executed and delivered to Plaintiff a promissory note or installment loan agreement," [Complaint ¶ 2, Record 2] McClellan responded "The Defendant admits that he executed the promissory note or installment loan agreement, but affirmatively asserts that his execution of that agreement was in his capacity as the secretary of the Callistoga Court Club, Inc." (Emphasis added) [Answer ¶ 2, Record 10]

Further, the answer asserted:

> "Second Defense Plaintiff's complaint asserts a liability for a promissory note which is a corporate liability not personal liability, and Defendant Robert E. McClellan is being sued personally." [Answer P. 1 Record 9]

It is a defense to liability on a promissory note that the signer was signing only as an officer of a corporation. Valley Lane Corporation v. Bowen 592 P.2d 589, 592 (Ut. 1979) ("It is so basic as to hardly require stating our agreement with defendants' argument that the corporate entity is separate from themselves as individuals and that business conducted through it will protect them from personal liability therefore.") Therefore, it was error for the court to grant the motion for judgment on the pleadings.

B. IF THE DISTRICT COURT CONSIDERED MATTERS OUTSIDE THE PLEADINGS, THE JUDGMENT MUST BE REVERSED BECAUSE MCCLELLAN WAS NOT GIVEN AN OPPORTUNITY TO PRESENT MATERIAL EVIDENCE.

The record demonstrates that prior to entry of the January 23, 1990 order, nothing outside the pleadings was presented to the court in support of the motion for judgment on the

pleadings.[4] It was not until the hearing on McClellan's motion to set aside judgment that Mountain America suggested, for the first time, that the order might be supported by McClellan's answer to a request for admission.[5]

Under Rule 12(c) "if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." McClellan was denied this opportunity.

(i) McClellan was given no notice that matters outside the pleadings would be considered.

McClellan was not given any notice that matters outside the pleadings would be considered by the court. He, along with the court, learned for the first time that Mountain America was relying on the request for admission at the hearing on the motion to set aside the judgment. The courts are consistent in reversing judgments that rely on matters outside the pleadings where

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[4]An affidavit of a Mr. Kevin Stevenson was submitted by Mountain America [Record 19] but it was solely addressed to the amount of interest and principle due on the note and did not address the merits of the claim or whether Defendants had signed only in their corporate capacities on the note.

At the hearing on the motion to set aside judgment, Mountain America's lawyer incorrectly represented to the court that its motion for judgment on the pleadings had been based on an answer to a request for admission, [transcript of hearing dated October 2, 1990 at 10]. However, the record is clear that the request for admission was not mentioned in any pleadings filed with the court prior to January 23, 1990, and the motion was decided without oral argument. [Record 15; 17; 35]

[5]Contrary to Mountain America's assertion, the answer to the request for admission does not establish any personal liability on McClellan's part. The request establishes, at most, that McClellan personally delivered the note and was personally present when the note was signed by him as secretary of the corporation. The full text of the Request is:

> Request No. 1: Admit that on or about the 5th day of June, 1984, you executed and delivered to Plaintiff a Promissory Note and Disclosure in the amount of $30,420.00 as secretary of the corporation Callistoga Court Club, Inc. and personally, a true and correct copy of which is attached hereto. [Record 22]

The request says nothing about whether McClellan was agreeing to personal liability when signing the note.

adequate notice of intent to do so is not given to the party opposing the motion. Securities Credit Corp. v. Willey 265 P.2d 422 (Ut. 1953) (reversing trial court because party opposing judgment on the pleadings was not accorded the opportunity to controvert interrogatory answers included in motion for judgment on the pleadings); Strand v. Associated Students of Univ. of Utah 561 P.2d 191, 193 (Ut. 1977) ("It is error to consider a motion to dismiss as a motion for summary judgment, without giving the adverse party an opportunity to present pertinent material.") Moreover, it is necessary that the record clearly and affirmatively demonstrate that all parties were given a reasonable opportunity to present additional pertinent material if matters outside the pleadings are considered. Bekins Bar V. Ranch v. Utah Farm Prod. Credit Assn 587 P.2d 151 (Ut. 1978). Here the record shows the opposite, that McClellan was not given an opportunity to present pertinent material.

(ii) Despite his affidavit, showing that evidence was discoverable that would establish his defense, McClellan was not given an opportunity to pursue that discovery.

Prior to the hearing on the motion to set aside judgment, McClellan's lawyer provided the court with his affidavit stating that he had spoken to Mr. Hoyt, the other corporate officer who had signed the note with Mr. McClellan, who informed him:

> "that there should have been no judgment issued against either himself or Mr. McClellan because they had signed the promissory note in question solely as officers of the corporate maker of the note, Callistoga Court Club.
>
> Mr. Hoyt also informed me that the second set of signatures on the promissory note were placed there by himself and Mr. McClellan and that they were placed there at the direction of the officers of Horizon Thrift and were not to represent a personal liability on the note." [Record 83]

At the hearing, McClellan's counsel informed the court that he had been unable to

obtain an affidavit from Mr. Hoyt. [Transcript of hearing dated October 2, 1990 at 8]. The court rejected McClellan's affidavit on Mountain America's objection that it contained hearsay and denied the motion to set aside judgment on the ground there was no evidence in the record to support McClellan's defense:

> "THE COURT: Why did he sign it?
>
> MR. SHUMATE: As a corporate officer. And he was instructed to sign it by Mr. Froyd. That's as much as I can tell Your Honor, because that's what I'm told.
>
> MR. KENT: But that's inadmissible, and we have not even an Affidavit from Mr. McClellan that says that.
>
> THE COURT: No, we don't. And that's the reason I granted the Motion for Summary Judgment.
>
> It seems to me that although the note may read that the makers are described above, if you -- if the officers of the corporation sign it in their corporate designation and also in their individual capacity, they are agreeing to be liable on the note.
>
> And I -- I find no other factual basis -- or no other basis in the record for any other explanation of why they signed the note, other than they were agreeing to be responsible for it. And that's why I granted the Motion for Summary Judgment, and that is still the ruling that I'm going to hold to.
>
> Transcript of hearing dated October 2, 1992 at 12-13.

The problem with the court's ruling is that it afforded McClellan no opportunity, as is required by Rule 12(c), to present the obviously pertinent material that a bank officer had instructed Mr. Hoyt and Mr. McClellan to sign the note a second time and that the signature would not result in personal liability.

(iii) <u>The affidavit of James L. Shumate should at least have been treated as a Rule 56(f) affidavit and McClellan should have been granted an opportunity to do discovery on the issues.</u>

Utah Rule of Civil Procedure 56(f) allows a party the opportunity to avoid judgment

when there are important facts that are yet to be uncovered through discovery. The Rule provides that "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Utah R. Civ. Pro. 56(f). The rule is intended to prevent a court from making a decision where the party opposing the motion for judgment has been unable to adequately present its evidence in opposition to the motion for judgment. Without this procedure, there is a "danger of founding judgment in favor of one party upon his own version of the facts. . . ." Strand v. Associated Students of University of Utah, 561 P.2d at 194.

The Utah Supreme Court has stated that motions under Rule 56(f) should be liberally treated. Strand, 561 P.2d 191, 194-95 (Utah 1984). It has also held that an important factor to be considered is whether the evidence sought is specific, rather than merely a request to conduct a "fishing expedition" in discovery. Cox v. Winters, 678 P.2d 313 (Utah 1984). The trial court should also determine whether the non-moving party has had an opportunity to controvert the assertions made by the party seeking judgment through the discovery process. Id.; Strand, 561 P.2d at 194.

In both Strand and Cox, the Utah Supreme Court found that the refusal to allow additional discovery based on the affidavit was an abuse of discretion. Cox v. Winters, 678 P.2d 311, 315 (Utah 1987) Strand v. Associated Students of University of Utah, 561 P.2d 191, 194 (Utah 1977). In reaching these decisions, the Court stressed that the information that was sought was specific and that discovery had not yet been completed.

Similarly, in this case, McClellan's attorney, in his affidavit and at argument before the court, asserted that specific evidence was available through further discovery and that it would controvert Mountain America's basis for summary judgment. At the hearing, McClellan's attorney reiterated this position that:

> "at the time of the execution of the note, the additional signatures were put on there at the instruction of Mr. Froyd of Horizon Thrift, who was the plaintiff's predecessor in interest, and that those signatures were not intended to be personal guarantees."
> Transcript Hearing of October 3, 1990 at p. 6

and indicated that he was unable to "get a hold of Mr. Hoyt to get an Affidavit signed." [Trans. Hearing Oct. 3, 1990 p.8]

Although technically Shumate's affidavit and statement in court is not in the form of a Rule 56(f) affidavit, it is the functional equivalent of such an affidavit. The Affidavit clearly puts the court on notice that there is evidence that specifically contradicts Mountain America's position and that extra time and discovery would allow McClellan to establish that fact. The fact that the affidavit is not labeled a Rule 56(f) affidavit is not a fatal flaw. The Utah Supreme Court has indicated that it will be controlled by the substance of the pleadings, not the captions that are used to describe the contents. See e.g., Gallardo v. Bolinder, 800 P.2d 816, 817 (Utah 1990); Armstrong Rubber Co. v. Bastian, 657 P.2d 1346, 1348 (Utah 1983). In addressing this very issue, the Utah Court of Appeals held that an affidavit that was not properly labeled as a Rule 56(f) affidavit, would be considered as such because the "substance of the affidavit suggests it was intended to be [a rule 56(f) affidavit]." Downtown Athletic Club, 740 P.2d 275, 278-79 n.2 (Ut. 1987).

There was evidence available that upon further discovery would have specifically

controverted Mountain America's claim that McClellan was personally liable on the note. That evidence was brought to the court's attention through Mr. Shumate's very specific affidavit which should not have been ignored by the court. This matter should be remanded to the district court to allow McClellan to obtain the evidence from Hoyt and to conduct further discovery from the officer of the Horizon First Thrift, Mr. Froyd.

VII. THE TRIAL COURT ERRED WHEN IT REFUSED TO RECONSIDER THE INTERLOCUTORY ORDER ENTERED AGAINST MCCLELLAN WHEN THE RECORD SHOWED THAT MOUNTAIN AMERICA FAILED TO EXHAUST REAL PROPERTY COLLATERAL THAT SECURED THE LOAN PRIOR TO FILING SUIT AGAINST THE SIGNERS OF THE PROMISSORY NOTE.

The trial court erred in refusing to reconsider the judgment, even though a final judgment had not been entered, when presented with evidence that would preclude Mountain America from recovering against McClellan[6].

Mountain America brought this action against Hoyt and McClellan as alleged makers of the Callistoga note, without first attempting to exhaust the real property collateral that secured the loan. Affidavit of Blake S. Atkin dated November 11, 1991 [Record 142] The issue came to the court's attention when McClellan's counsel filed a motion to reconsider on November 11, 1991. [Record 138] Along with the motion, McClellan's counsel filed an affidavit wherein he asserted that he had learned of the real property security arrangement from Mountain America's

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[6]Although the Utah Rules of Civil Procedure do not expressly provide for a motion to reconsider, by implication Rule 54(b) allows such a motion in cases involving multiple parties. See Salt Lake City Corp. v. James Const. Inc., 761 P.2d 42, 44 n.5 (Utah Ct. App. 1988). The Utah courts, as well as others, have noted on a number of occasions that it is proper for a trial court to review a decision and change its decision prior to its final entry. See e.g., Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985)(citing McCollum v. Clothier, 121 Utah 311, 320, 241 P.2d 468, 472 (1952); Chapman v. Jesco, Inc., 98 N.M. 707, 709, 652 P.2d 257, 259 (1982); Johnson v. Whitman, 1 Wash.App. 540, 541, 463 P.2d 207, 209 (1969)); Williams v. Barber, 765 P.2d 887, 891 (Utah 1988) J., Zimmerman, concurring in result; see also In re Blalock, 233 N.C. 493, 64 S.E.2d 848, 858 (1951); McKee v. William, 741 P.2d 978, 980-81 (Utah Ct. App. 1987).

counsel for the first time on November 7, 1991. [Record 142] In all its pleadings, the Plaintiff had failed to inform the court or Defendant that the note had been secured by real estate.

Utah has adopted a one-action rule in cases where loans are secured with real property. See D. Milner, Real Property Collateral: The "One-Action" Rule in Action, 1991 Utah L. Rev. 557, 557. The Rule provides: "There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provision of this chapter." Utah Code Ann. §78-37-1.

The one-action rule requires the creditor to exhaust the real property collateral prior to taking any action to collect on the loan. In the words of the Court in First Nat'l Bank of Coalville v. Boley, 90 Utah 341, 61 P.2d 621, 623 (1936): "Under [the one-action rule] there is no personal liability on the part of mortgagor until after foreclosure or sale of the security and then only for the deficiency then remaining unpaid; a mortgagee may not have a personal judgment against the mortgagor until the security has first been exhausted. That position has been reaffirmed in a number of subsequent decisions. See e.g., Lockhart Co. v. Equitable Realty Co., 657 P.2d 1333 (Utah 1983).

Thus, in this case, because Mountain America failed to take any action against the property, it is precluded from taking action against the signers of the note, as a matter of law.

A. Mountain America cannot claim the junior lienholder exception to the one action rule.

In opposition to McClellan's motion to reconsider, Mountain America appears to have taken the position that this case fits within an exception to the one-action rule as found in Cache Valley Banking Co. v. Logan, 88 Utah 577, 56 P.2d 1046 (1936), although no reference to the exception is made in Mountain America's motion. In Cache Valley, the Court found that where

the position of the secured party was that of a junior creditor there was no need to bring an action on the property, if the senior creditor had already exhausted the collateral. Id. at 1049 (emphasis added).

However, the Court has strictly limited the scope of the exception and created important, required burdens of pleading and proof before the exception applies. In Lockhart Co. v. Equitable Realty, Inc., 657 P.2d 1333, 1336 (Utah 1983), the Utah Supreme Court held that prior to claiming a junior lienholder exception the lienholder had to make a "proper allegation and proof . . . that the security has become valueless." Id. If the junior lienholder does not make an adequate showing that the collateral is without value, the lienholder "is precluded by the 'one-action rule' from pursuing his action on the note." Id. Here, Mountain America has failed to show anything in the record where it has alleged or proved the exhaustion of the collateral. Indeed, there is no evidence in the record that the property had been foreclosed on and that it was without value. In fact, McClellan was not aware of the security's continued existence until Mountain America's new attorney informed him of the security in late 1991. Without the allegation and the proof that the property was valueless, Mountain America's action against McClellan must be dismissed as a matter of law.

B. Mountain America was not in fact a junior lienholder but was in first position and let the collateral slip through its hands.

Mountain America's lienholder position was in fact that of a senior creditor. [Affidavit of Blake S. Atkin in Support of McClellan's Motion to Reconsider and Set Aside Judgment dated December 4, 1991, Record 181]. Mountain America erroneously assumed that Zion's First National Bank had a priority lien against the property. However, Zion's deed of trust contained an erroneous description of the property. And although Zion's received its deed first in time, it

was filed incorrectly. Mountain America then recorded its deed of trust correctly. Sometime after Mountain America recorded its deed, Zion's corrected the error in the title description. [Affidavit of Blake S. Atkin dated December 4, 1991 at ¶ 3. Record 181] However, because Utah is a race-notice jurisdiction for the purpose of recording of property deeds, the first trust deed to be properly recorded has priority even though it may have been granted subsequent in time. See Utah Code Ann. §57-3-3; Neeley v. Kelsch, 600 P.2d 979, (Utah 1979); Kemp v. Zion's First Nat'l Bank, 470 P.2d 390, (Utah 1970). Thus, Mountain America's trust deed has priority over the trust deed foreclosed by Zion's.

Zion's recognized this legal principal in the trustees deed it issued at the foreclosure. The trustees deed states: "Whereas Callistoga Court Club by deed of trust dated March 8, 1984 and recorded February 19, 1988..." [Affidavit of Blake S. Atkin dated December 4, 1991, Exhibit B, Record 188]. Thus, even Zion's conceded its priority date to be February 19, 1988, some four years after Mountain America's trust deed was recorded.

Thus Mountain America failed or neglected to protect its interest in the collateral and to foreclose on its priority position precluding its claim under the one action rule.

VIII. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO ALLOW MCCLELLAN TO AMEND HIS ANSWER TO INCLUDE A CROSS CLAIM AGAINST HOYT AND THIRD PARTY CLAIMS.

McClellan attempted to amend his answer to include a cross claim against Hoyt who was already a party to the proceeding and to receive leave of court to file third party complaints against non-parties who were shareholders of Callistoga. Because the trial court has discretion whether to allow an amendment to the pleadings, this Court reviews the trial court's action under an abuse of discretion standard. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983).

Utah Rules of Civil Procedure 13(f) authorizes a party to plead a "cross-claim . . . against a co-party arising out of the transaction or occurrence that is the subject matter of the original transaction. . ." Utah R. Civ. Pro. 13(f). Rule 15 provides that "a party may amend his [or her] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Utah R. Civ. Pro. 15. As a general proposition, the rule tends to favor granting a leave to amend a pleading. See e.g., Westley v. Farmer's Ins. Exch., 663 P.2d 93, (Utah 1983). In determining when an amendment is proper, the court's primary consideration is whether a party has an opportunity to defend against the claim and whether any party receives an unfair advantage by the amendment. Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983). Courts are much less likely to grant an amendment when the amendment will delay the adjudication of the case. See Girard v. Appleby, 660 P.2d 245 (Utah 1983); Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 24 Utah 2d 271, 470 P.2d 257 (Utah 1970).

Here, there was no reason for the trial court to deny McClellan's motion for leave to amend and bring a cross-claim against Hoyt. There was no trial date established, no discovery cutoff established and no motion cutoff established. Second, Hoyt was not prejudiced in any way. Hoyt's liability, if any, is predicated on the exact facts and documents as McClellan's. In that regard, Hoyt knew of the issues and was prepared to defend against them. Any defense that Hoyt had prepared against Mountain America would be equally effective against McClellan. Third, joining Hoyt might well have prevented another trip before the court in another lawsuit based on contribution. Finally, without the cross-claim, there is a possibility that McClellan will be forced to bear an unfair burden of the judgment, in the event this Court rules against him. It is likely that

Hoyt will assert claims of res judicata and collateral estoppel against McClellan in any suit for a right of contribution. Even if McClellan can successfully defeat these claims, he will have suffered through the emotional turmoil of another set of judicial proceedings, not to mention the additional litigation expenses. In short, the refusal to allow the motion to amend to include a cross-claim will only increase the costs to the litigants and subject McClellan to the possibility of inconsistent judgments on the same facts.

CONCLUSION

For the foregoing reasons, the court's January 23, 1990 judgment, its December 27, 1991 order denying McClellan's motion to reconsider, and denying McClellan's request to file a cross claim and third party claims, should be reversed and this case remanded to the District Court for further proceedings.

Respectfully submitted this 29 day of May, 1992.

Blake S. Atkin
Attorney for Appellant

Certificate of Service

I hereby certify that a true and correct copy of the APPELLANT MCCLELLAN'S BRIEF was served by mailing the same, first class postage prepaid, this 29th day of May 1992, to the following:

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